Supreme Court, U.S.
FILED
JUN 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1891

In The

Supreme Court of the United States

October Term, 1988

M&M CONSTRUCTION CO., INC.

Appellant,

vs.

GREAT AMERICAN INSURANCE CO.

Appellee.

MOTION TO DISMISS

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PARTIES BEFORE THE COURT

The only parties of record in the state proceedings were M & M Construction Co., Inc. ("M & M"), the plaintiff in the trial court, and Great American Insurance Co. ("Great American"),[1] defendant. Appellant's inclusion of M & M's purported "successors, namely, its two stockholders," in its identification of parties to this appeal is improper and misleading since the alleged individual successors never appeared as parties in the actions below.

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1. Appellee is a subsidiary of Great American Holding Corporation, which is a subsidiary of American Financial Corporation. Other subsidiaries include ABI Management, Inc., Agricultural Excess and Surplus Insurance Company, Agricultural Insurance Company, American Alliance Insurance Company, American Empire Surplus Lines Insurance Company, American National Fire Insurance Company, American Spirit Insurance Company, Atlanta Casualty Company, Brothers Property Corporation, Dempsey & Siders Agency, Inc., GAI-N26LB, Inc., Eagle American Insurance Company, Great American Life Insurance Company, Great American Lloyd's Insurance Company, Great American Management Services, Inc., Hunter Savings Association, Moore Group Inc., Stonewall Insurance Company, and Transport Insurance Company.

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INTRODUCTORY STATEMENT CONCERNING JURISDICTION

Appellant M & M characterizes its application for review before this Court as an appeal, misciting abrogated 28 U.S.C. § 1257(2) as the statutory authority conferring jurisdiction over this matter. Appellant's stated basis for jurisdiction is unclear and ambiguous, and fails to meet the specificity required by the Rules of this Court.

For the purpose of responding to Appellant's filed document filed with the Court, however, Appellant's style of application for review will be responded to accordingly with a motion to dismiss and Great American will identify itself as Appellee. If Appellant's jurisdictional statement is construed as a petition for a writ of certiorari, Appellee asks the Court to consider its responsive pleading a brief in opposition to the petition for writ of certiorari.

Pursuant to the Rules of the Supreme Court of the United States, Appellee Great American moves that the appeal filed in the above-entitled cause be dismissed for the following reasons:

1. The federal question sought to be reviewed was not timely or properly raised, nor expressly considered by the state courts.

2. The appeal fails to articulate a substantial federal question.

STATEMENT

Appellant's lawsuit in a Texas State court was dismissed by summary judgment in accordance with Texas law because Appellant, a disenfranchised corporation,[2] lacked the capacity to sue in state court. Appellant failed to respond timely to Great American's summary judgment motion.

Appellant's appeal to the state appellate court consisted of various points of error relying exclusively on state law. Based on a review of the record, the state appeals court affirmed the trial court's order granting summary judgment. Appellant filed two motions for rehearing with the appeals court. The first was denied, and the second dismissed.

Appellant attempted an appeal to the Texas Supreme Court. Appellant apparently did not meet the deadline for filing the required Application for Writ of Error, as the Texas Supreme Court dismissed Appellant's Application on November 22, 1988 with the notation "writ dismissed for want of jurisdiction." *See* Appellant's Jurisdictional Statement, Appendix at 2.

Appellant did not properly present its due process claim before any of the state courts below.

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2. M & M was disenfranchised because of its failure to pay state corporate franchise taxes. *See* Texas Tax Code § 171.252.

ARGUMENT

A FEDERAL QUESTION WAS NOT TIMELY OR PROPERLY RAISED, NOR EXPRESSLY CONSIDERED BY THE TEXAS COURTS.

Appellant's denial of due process claim[3] was not properly presented or preserved for appellate review in the state courts, thus barring its consideration by this Court.

1. Appellant failed to properly raise the federal issue in the state courts.

As a matter of establishing jurisdiction before this Court, Appellant must demonstrate that a federal question was timely presented for due consideration in the appropriate state courts.

In this case, Appellant complains that the trial court's discretionary dismissal of Appellant's lawsuit resulted in a denial of due process. Appellant's first opportunity to raise the due process claim was at the trial court level, by a motion for new trial or motion for reconsideration. Appellant filed neither and, instead, sought review from a state appeals court.

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3. As discussed further below, Appellant fails to articulate a substantial federal question for consideration by this Court. Unclear is the exact nature or substance of Appellant's denial of due process claim. Appellant does not directly challenge the validity of any Texas law or statute, and merely refers to alleged abuses of discretion by the state courts without substantiating its allegations of specific unconstitutional conduct.

Although Appellant had the opportunity to present its due process claim for consideration by the state appeals court, Appellant's state court appeal brief contained not a word about due process.

Appellant did not even mention due process until it filed a motion for rehearing with the state appeals court, on April 7, 1988, that included other points of error based on state law. Appellant's argument consisted of a glib conclusion characterizing the trial court's granting of summary judgment as a denial of due process without any lucid explanation or identification of specific unconstitutional judicial action or state law. The motion for rehearing was denied by the state appeals court on April 28, 1988.

The Texas Supreme Court never expressly considered Appellant's due process claim as it dismissed Appellant's Application for Writ of Error for want of jurisdiction.

Appellant's appeal lacks any prior final adjudication of a federal question, which is necessary for review by this Court. Because Appellant never properly presented *any state court* with its due process claim, no court was given an opportunity to address the merits of this contention. Review by this Court is clearly not warranted. *Cardinale v. Louisiana*, 394 U.S. 437 (1969) ("the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions"); *Street v. New York*, 394 U.S. 576 (1969) ("when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state court").

2. Appellant failed to properly preserve the due process claim for further appellate review.

In order to preserve a state court's decision or action for appeal to the Texas Supreme Court, an Application for Writ of Error must be filed "within thirty days after the overruling of the last *timely* motion for rehearing filed by any party." Tex. R. App. P. 130(b) (emphasis added).

Appellant's first motion for rehearing was denied by the state appeals court on April 28, 1988. Appellant then filed a second motion for rehearing with the state appeals court. A second motion for rehearing is appropriate when a state appellate court modifies or vacates its judgment, or issues an opinion in connection with the overruling of a motion for rehearing. Tex. R. App. P. 100(d). Since this did not happen, Appellant was not entitled to file a second motion for rehearing.

By filing an improper second motion for rehearing, Appellant neglected to file the necessary Application for Writ of Error to the Texas Supreme Court within the prescribed time. The last timely filed motion for rehearing was denied by the state appeals court on April 28, 1988. Therefore, Appellant's application for writ of error to the Texas Supreme Court was due on or before May 27, 1988, thirty days after the denial of the last *timely* filed motion for rehearing. Tex. R. App. P. 130(b) (emphasis added). Appellant did not file its Application until June 17, 1988.

On November 23, 1988, the Texas Supreme Court dismissed Appellant's Application for want of jurisdiction. Appellant, by its own noncompliance with Texas procedural law, failed to properly appeal this matter to

the Texas Supreme Court and keep intact the appellate chain necessary to reach this Court. Irrespective of merit, this appeal is clearly ineligible for consideration by this Court. *Edelman v. California*, 344 U.S. 357 (1953) ("this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law").

3. Failure to properly preserve the right to appeal prevented state court consideration of the due process claim.

Because Appellant failed to preserve its right to appeal, the Texas courts were prevented from expressly passing on Appellant's claim of denial of due process. As a result, the records of the state courts lack any discussion or treatment of Appellant's constitutional claim. This Court is not the place for first time review of a constitutional issue allegedly arising from a state court system. *Webb v. Webb*, 451 U.S. 493 (1981) ("At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law"); *Cardinale v. Louisiana*, 394 U.S. at 438.

THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

1. Appellant fails to attack the constitutionality of any specific state statute.

While Appellant frames its entire due process claim in the context of the Texas summary judgment rule, it

fails to draw into question the validity of *any* state statute. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562, n. 4 (1980) (validity of state statute not "sufficiently drawn in question" not proper for appeal). Thus, no appeal should lie.

2. Appellant has been afforded due process in the Texas courts.

Appellant alleges that the Texas courts have denied it due process. Actually, any denial of access to the court system resulted from Appellant's failure to comply with clear state procedural requirements; specifically, filing a timely response to a summary judgment motion, and filing a timely Application for Writ of Error to the Texas Supreme Court.

3. The actions of the Texas courts were proper and in accordance with Texas summary judgment law.

The matter before the trial court was a summary judgment motion. In Texas, a summary judgment motion is a vehicle for determining the legal sufficiency of a lawsuit. Texas rules of procedure require that a response to a motion for summary judgment must be filed no later than seven days before the hearing in order to be considered timely. Tex. R. Civ. Pro. 166a(c). Appellant acknowledges in its Jurisdictional Statement that it did not file a response to the summary judgment motion until one day before the hearing. *See* Appellant's Jurisdictional Statement at 4.

Through all of Appellant's attempts at appeal, the *only* denial of due process argued by Appellant is that the state courts allegedly "ignored" an amended petition filed by Appellant in the trial court. Appellant contends that the amended petition should have been considered by the state trial and appellate courts, even in the absence of a timely response by Appellant to the summary judgment motion evidence.

Texas law is clear that an amended pleading is not a response to a summary judgment motion, nor is it competent summary judgment evidence. *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671 (Tex. 1979). Accordingly, under Texas procedural law, Appellant's amended petition could not be properly considered as a response to Great American's motion for summary judgment. It was entirely proper for the trial court to grant Great American's motion for summary judgment since there was no proper response from Appellant to this motion.

CONCLUSION

Appellant has not followed the procedure necessary for review by this Court. Even if Appellant had followed proper procedure, this appeal fails since it does not present a substantial federal question.

Appellee accordingly respectfully requests that this Court dismiss or deny Appellant's request for appeal.

Respectfully submitted,

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